

July 31. 1766.

5th Aug 1766
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ANSWERS

FOR

David Modrell of Muirmiln,

TO THE

PETITION of John Din Portioner
 of Easter-Craigannet.

IT was after the most mature consideration of the case, that the Lord Auchinleck, Ordinary, pronounced his interlocutor upon it, "Finding, from the tenor of the disposition granted by Andrew M'Lay to John Liddel, joined with the amount of the price, not being quite twenty years purchase, in the 1737, there is sufficient evidence that Andrew M'Lay did not intend to make a sale of his lands, but only to obtain a delay of diligence from John Liddel his creditor; and therefore, that the clause, by which the lands are declared to be irredeemable, in case M'Lay did not pay up this debt to Liddel within the time limited, is to be considered as penal; and that it is competent to the pursuer, as

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• in right of M'Lay, to redeem the lands, upon payment of the sum truly due, after the intromissions had by the defender and his predecessors.

• Against this interlocutor the defender, Mr Din, reclaimed, and insisted, 1^{mo}, To have it found, that the disposition was absolute, and the lands now irredeemable; or, at least, 2^{do}, That he could not be accountable for bygone rents since Martinmas 1742; and that the lands could only be redeemed by payment of the sums due at that term. The defender's argument, on both these points, was fully answered by the pursuer; and your Lordships, on the 4th of July current, were pleased to adhere to the Lord Ordinary's interlocutor.

The unanimity with which this judgment was pronounced, and the clearness of the second, as well as the first point in his favour, made the respondent apprehend, that your Lordships would have had no further trouble in this matter. However, he has found himself disappointed by the defender's reclaiming as to the second point, and still insisting, that he should not be found accountable for the rents of the lands since Martinmas 1742.

In these answers, it is unnecessary to resume the titles and facts particularly stated in the former papers, especially as the substance and import of them is abridged in the interlocutor above recited, and the whole will be well remembered by your Lordships.

• It is however proper to notice, that, by the express words of Andrew M'Lay's disposition to John Liddel, it is proved, That the sole cause of granting that deed was the avoiding the expences and accumulations consequent upon Liddel's obtaining an adjudication of the lands, for which purpose he had already raised a summons of adjudication. It is manifest therefore, that M'Lay had not the least intention to sell or alienate his lands; but was obliged

obliged to grant that disposition in such terms as his creditor prescribed, in order to avoid the effect of rigorous diligence, and in hopes that he would be able to clear the debt, and preserve the property of his lands.

Another fact your Lordships will have in view; namely, that from the proof which was adduced of the rental of the lands, both old and new, it clearly appeared, that the extent of the debt, in the 1742, was far short of the value of the lands, and that the rent did then exceed the interest in near one-third; and that in later years, by the death of Janet Adam the liferenter, the free rent has exceeded the interest in more than a third, or about 5 l. 4 s. 2 d. Sterling; so that, if the petitioner were to prevail in his present demand, the tendency of it would be, to put that excrecent rent in his pocket for above twenty years past, without any just cause; and, at the same time, to keep up his debt as it stood in the 1742, as a charge upon the respondent; so that he would, in effect, draw near double payment of that debt.

These circumstances being considered, the respondent apprehends your Lordships will be satisfied, there is no ground in law or equity for altering that part of the interlocutor complained of. The clause of assignment to the mails and duties recited in the petition, cannot possibly avail the petitioner. The deed itself was drawn as the creditor thought fit to have it; and that clause was made consistent with the rest of the deed, which contained the usual words of a disposition, and declared the lands irredeemable after Martinmas 1742. In correspondence thereto, the assignment to the rents was made to be, to the extent of the annual rents preceeding Martinmas 1742, and absolute after that term. The whole deed therefore must either stand or fall together; and if the petitioner's argument, from the assignment to the rents, were good, it would necessarily go the length to support

support the disposition as an absolute and irredeemable right; whereas it is now fixed and determined, that it is truly no more than a right in security, containing a penal irritancy, purgeable at any time before declarator.

Taking the matter on this footing, as it is now established, the unavoidable consequence seems to be, that the right must, at this day, be held of the same nature as it was in the period between the 1737 and the 1742. It is admitted, that, during that period, the creditor was only intitled to draw his annualrents out of the rents; and if he drew more, was accountable for it: And it is only upon the supposition that the right did not change its nature in the 1742, but still continued a security, that the lands are at all capable of being redeemed. If then the irritancy, being evidently penal, cannot prevent the redemption, without being foreclosed by a declarator, or be sustained to forfeit the debtor of his property of the lands, neither can it be allowed the effect of imposing upon the debtor the forfeiture of any part of the surplus rents.

Again, it is a fixed point, that no sale for an adequate price was agreed on between the parties; and therefore no argument can be drawn to this case from that of a true and fair sale, where a right of redemption, limited to a certain term, is yielded *ex gratia* by the buyer to the seller. And if it cannot be pretended that a sale was concluded, as little can it, with any shadow of reason, be alledged, that, by this disposition, the security was, after the 1742, converted into the nature of a proper wadset. The whole tenor of the deed shows the direct contrary, and can admit of no *medium* between an absolute sale and a continuation of the security upon its original footing, until altered, and the redemption foreclosed by a declarator.

Your

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Your Lordships will observe, that the deed declares the lands redeemable by the debtor's payment of the principal sum and annualrents, so long as the redemption was competent; and as it is still found competent, the same rule must subsist, of the lands being redeemable, upon payment of what shall be found due of the principal and interest, after imputing *pro tanto* the rents uplifted by the creditor.

Had the case been reversed, and the petitioner been insisting against the debtor for payment of his debt, or to have the irritancy declared, he could have asked no more than such a balance, supposing the rents to have exceeded the annualrents; or, if the rents fell short of the annualrents, he certainly would have been intitled to have demanded whatever was unpaid of his debt. There is nothing in the disposition expressed, or implied, that, in this last case, could have obliged the petitioner to have taken the rents in satisfaction of his annualrents, as in the case of a proper wadset; but, on the contrary, by the express tenor of the clause of redemption, the petitioner must have paid up the full annualrents. The tendency of the petitioner's argument therefore is, to create a most usurious contract, by which he would put the surplus rents in his pocket, when they happen to exceed the annualrents; but, if they fell short, would oblige the debtor to make up the deficiency.

The petitioner being sensible of the impossibility of converting this disposition into such an anomalous right as could serve his purpose, has recourse, in the second place, to a plea of *bona fides*, and contends, That, his father having obtained from the superior a charter of these lands, *hereditably and irredeemably*, and the petitioner himself having afterwards obtained a precept of *claire constat*, without any mention of a reversion; these circumstances put both father and son in *bona fide*, to consider themselves as irredeem-

able proprietors of the lands, and to employ the rents accordingly.

But, to this argument it is answered, *1mo*, That, from the petitioner's own showing, the charter his father obtained proceeded on the express recital of M'Lay's disposition in question, and the precept of *clare* was granted to connect with that charter and disposition: Both father and son therefore must be presumed to have known, that their right was only a security, and still redeemable, agreeable to the original clause of redemption, that is, Upon receiving payment of their debt, either out of the proceeds of the subject or otherways, while no declarator of irritancy was obtained. They are not therefore to be considered as on a similar footing with those who have possessed on a right apparently good, but which comes to be overthrown, upon some ground before utterly unknown to them.

2do, Supposing the petitioner or his predecessors to have actually mistaken the nature of their own right, it would not be a sufficient cause for depriving the respondent or his cedent of the benefit of those rents, by supposing their plea of a *bona fide* possession, at least to the extent it is now pleaded. If the right upon which possession is had, is liable to a legal objection or nullity, *ignorantia juris non excusat*; according to what is laid down by Lord Stair (*Book 2. tit. 1. §. 24.*), where he refers to the case of Grant, observed by Durie, 16th Nov. 1633, and thus abridged in the dictionary: "A wife's right in lands, constituted by infestment, taken in terms of her contract of marriage, is so effectually extinguished by the husband's death within year and day after the marriage, that it does not afford her even a colourable title of a *bona fide* possession, to make *fructus perceptos et consumptos suos*, though the infestment proceeded upon a new right granted to the husband by his superior, and contained no clause bearing relation to the contract of marriage."

And

And 3rd, The petitioner totally misapprehends the principle upon which a *bona fide* consumption has been allowed to defend against repetition of rents, when he endeavours to apply that plea to support his present demand. Equity has suggested the hardship of obliging one who has possessed and consumed the rents and profits of a subject, believing it to be his own property, to repeat those rents to the person afterwards instructing a preferable right. But that does not apply to the case of one who possesses upon a right, which, by its own nature, is found to be extinguishable, and is by intromission actually extinguished, so as to prevent the possessor's imputing the rents in extinction accordingly. The possessor under a right of this last kind, can complain of no hardship, when he is not obliged to repeat the rents, but they are only applied in *solutum* of the debt for which his right was granted. By such imputation, if he can be said to suffer any loss, when he has actually received his payment, it is no other loss than every *bona fide* possessor, under a right of property supposed good, may sustain, when it is reduced, namely, The loss of the price he paid for such right. The debt in the one case is equivalent to the price in the other; and there can be no equity in suffering a creditor, merely because he erroneously supposed himself a proprietor, not only to enjoy the rents of his debtor's subject, but also to take full payment of his debt in the same manner as if he had not enjoyed those rents. This would truly be not simply defending him against repetition of rents he had consumed *qua* proprietor, but, in effect, giving him a right to sue for, and exact, *qua* creditor, a double payment at the expence of the debtor.

Upon this just distinction, your Lordships have uniformly found, that although *bona fides* saves from repetition of the fruits, yet it does not save from extinction of any extinguishable right in the possessor's person, by application
of

of those fruits. Thus, an adjudication, long after expiry of the legal, being restricted to a security, your Lordships have, in sundry cases, found that the rents intromitted with after expiry of the legal, and while the adjudger or his disponent, *bona fide*, considered himself as proprietor, and unaccountable, did nevertheless impute in extinction of the debt adjudged for. This in particular was so found in a case observed by Lord Kaims, Jan. 1720, Walker *contra* M'Pherson. The like judgment was given June 20. 1722, Rutherford *contra* Crumlie. And Feb. 1732, Balfour *contra* Wilkieson. And in other cases collected in the dictionary, Vol. I. P. 107.

Your Lordships have likewise applied the same principle to the questions relative to other securities than adjudications: Thus, in a case determined in December 1760, between the heirs of William Seller and David Wilson; Mr Seller having prevailed in getting a disposition reduced, under which Wilson's predecessor had possessed a tenement in Edinburgh for a great many years, *ex capite inhibitionis*, Wilson thereupon insisted on an heretable bond, which stood in the person of his predecessor prior to the inhibition, as still a subsisting debt; but your Lordships found the sum in the said heretable bond extinguished by Wilson and his predecessor's intromissions with the rents, notwithstanding the plea of *bona fide* possession.

And to come still nearer the present case; a person having borrowed money, and granted a security to the creditor, by disposing lands in the form of an absolute disposition, taking at the same time a back-bond, declaring that the lands should be redeemable within a certain limited space, by payment of the money; redemption was found competent at any time before declarator, notwithstanding that the term limited was past; this being a *pactum legis commissoriae in pignoris*. And, from the case as observed by Durie, 8th July 1636, Cleghorn, it appears, that the Lords appointed

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of those fruits. Thus (and) long after expiry of
appointed a compt and reckoning to be made between the
parties.

And in another case of the like kind, where the disposi-
tion was qualified by a back-bond and right of reversion
within a limited time; but the circumstances still more
favourable for the creditor, and more like to a condition-
al sale for an adequate price; the Lords still found the ir-
ritancy purgeable before declarator, upon payment of the
debt, the creditor finding caution to compt and reckon for
his intromissions with the rents; 23d Feb. 1699, Kintore
contra Ramsay. Many other cases might be quoted to the
same purpose; and, so far as the respondent can discover,
there is no case where the irritancy of a right of redemp-
tion in a contract of the present kind, was kept open as
penal, and the creditor was not likewise obliged to ac-
count for all his intromissions with the rents, or impute
them in payment.

The respondent, upon the whole, humbly hopes, he has
thus satisfied your Lordships, that the interlocutor is per-
fectly consistent both with principles and precedents; and
he hopes to be excused for making his answers full, as the
rents in dispute will amount to a pretty considerable
sum.

In respect whereof. &c.

DAY. RAE.

appointing a commissioner to be made between the parties.

And in another case of the like kind, where the obligation was qualified by a back-bond and right of redemption within a limited time; but the circumstances still more favourable for the creditor, and more like to a conditional sale for an adequate price; the Lords still found the creditor purchasable before declaration, upon payment of the debt, the creditor finding caution to convert and reckon for his intromissions with the rents; 23d Feb. 1699, Kinross v. Ramsay. Many other cases might be quoted to the same purpose; and, so far as the respondent can discover, there is no case where the intromission of a right of redemption in a contract of the present kind, was kept open as penal, and the creditor was not likewise obliged to account for all his intromissions with the rents, or impute them in payment.

The respondent, upon the whole, humbly hopes, he has thus satisfied your Lordships, that the interlocutor is perfectly consistent both with principles and precedents; and he hopes to be excused for making his answers full, as the rents in dispute will amount to a pretty considerable sum.

In respect whereof &c.

DAV. RAE.